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No.

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In the Supreme Court of the United States

October Term, 1982

JEWEL BURRUS,
Petitioner,

vs.

UNITED TELEPHONE COMPANY
OF KANSAS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the Respondent discriminated against the Petitioner in her employment on the basis of sex where Respondent relied upon subjective determinations to refuse to promote petitioner, the Respondent engaged in certain conduct in retaliation for petitioner's filing a complaint with the Equal Employment Opportunities Commission, and where the Petitioner presented statistical evidence strongly supporting her allegations that Respondent engaged in a pattern of discrimination.

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UNITED TELEPHONE COMPANY
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this matter on July 22, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals of July 22, 1982 is reported at 683 F.2d 339 and is reprinted in the separate Appendix A to this Petition, pp. A1 to A10. The prior opinion of the United States District Court for the District of Kansas is not yet reported and is reprinted in the separate Appendix B to this Petition, pp. A11 to A20.

JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following Statutes:

42 U.S.C., Section 2000e-2 states in pertinent part as follows:

(a) It shall be an unlawful employment practice for an employer—

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

42 U.S.C., Section 2000e-3 states in pertinent part as follows:

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has opposed a practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C., Section 2000e-5 states in pertinent part as follows:

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in the unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

. . . .

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT

Petitioner is a female accountant who was employed with the Respondent from February 1970 through January 1976. Petitioner originally filed a complaint of sex discrimination in March 1973, claiming that Respondent had discriminated against her by failing to promote her. She later alleged that Respondent retaliated against her for filing the claim by discharging her in January 1976.

The U.S. District Court for the District of Kansas issued a Journal Entry of Judgment in favor of the Respondent on June 19, 1980. Appendix B at A11-A20. In its Memorandum and Order upon which the Journal Entry

was based, the Court made certain Findings of Fact, summarized as follows:

Petitioner is a female accountant. Respondent employed her between February, 1970, and January, 1976. United Systems Services, Inc. employed Petitioner between June, 1968, and February, 1970. Respondent and United Systems Services, Inc. are wholly-owned subsidiaries of United Telecommunications, Inc., a holding company. During her tenure with respondent, petitioner advanced from a Job Grade 9 to a Job Grade 12. Although she did not receive her accounting degree until 1972, petitioner's job title with respondent throughout her employment was "accountant." Respondent did not promote petitioner during the term of her employment with respondent. Prior to her employment with United Systems Services, Inc., petitioner worked for the American Telephone and Telegraph Company between 1948 and 1968. During the last five years of her time with A.T. & T., petitioner served as an Accounting Supervisor. While with A.T. & T., however, petitioner never had occasion to supervise anyone who possessed an accounting degree. Petitioner acquired her Bachelor of Science in Business Administration, with a major in Accounting, in 1972. While still in the employ of Respondent, petitioner took certain coursework toward a Master of Arts degree.

Petitioner's cause of action is premised upon the allegations that Respondent failed to promote petitioner and took certain retaliatory actions against petitioner due to the fact that respondent actively pursued a policy of sex discrimination in employment. Petitioner was specifically disgruntled by the fact that certain of her male contemporaries were promoted to supervisory positions within the respondent's company. Petitioner complains that she was as well qualified as the males in question, that she

had made known her desire for promotion, and that respondent not only refused to promote petitioner, but also closed out the available positions by appointing males to them.

In consequence of the allegedly discriminatory decisions of respondent in promoting certain males to supervisory positions, petitioner filed a charge of sex discrimination in March, 1973 with the Equal Employment Opportunity Commission and the Kansas Commission on Civil Rights. Petitioner claims that as a result of having filed the charge in question, respondent retaliated against petitioner by among other things, further restricting her growth opportunities and generally conspiring to drive her out of the firm. Respondent's failure to promote petitioner, as well as its alleged retaliation against her for the EEOC-KCCR claim, form the basis of this action.

The court found as a matter of fact that the ability to get along and communicate with one's peers, subordinates and superiors is a crucial consideration in the determination of whether a person is suitable for promotion to a supervisory position in nearly any business setting, and specifically in the context of petitioner's employment with respondent. The court found that there is no evidence either documentary or testimonial, which would tend to establish that petitioner possesses this critical quality.

The evidence in this case indicated that petitioner may have been technically as well qualified as some of her male counterparts who were promoted. The Court found, however, that she was not as technically qualified as two of the males about whom she had complained and suggested that petitioner was indeed ill-qualified for promotion to a supervisory position, in that she lacked the interpersonal skills necessary for such an advancement. The Court found that petitioner remained unpromoted be-

cause she was uncommunicative and unable to work effectively with others.

A substantial amount of testimony adduced at the trial of this case involved statistical evidence prepared by an expert witness for the Petitioner. The witness worked from data limited to Pay Grades 8 through Pay Grade 19; Petitioner began her work with the company as Pay Grade 8, and level 19 appeared to be the highest to which she could have advanced. Petitioner's counsel compiled information from the years 1973 through 1976 into a pattern as set up in Petitioner's exhibit. Counsel also requested from the counsel for the Respondent any further information to complete that compiled by the Petitioner. The records provided to Petitioner by the Respondent enabled the Petitioner to identify the department for each employee, the pay grade, the actual pay, the sex, and the specific job title.

Petitioner's expert then performed four or five different types of statistical procedures and techniques in making up his final report, which is in the record as Petitioner's Exhibit 75. In arriving at the final form of Exhibit 75, the expert ran approximately forty (40) tests and totals. One of the tests consisted of a comparison of the average salaries of males and females in each of the various pay grades used by the Respondent. One of the analyses made by the expert witness showed that in six of the eight grades in which both male and female employees were employed by the Respondent, that average female's salary was less than the average male's salary. It also showed that females were concentrated in the lower grades whereas males were concentrated in the upper grades. The expert further testified that in five out of seven groups, male employees received higher salaries;

in one of the remaining groups there was no male, and in the other, there was no female. The expert witness also performed something called a "Key Test" to compare the mean salaries of the male and female employees. The result that he obtained he considered to be statistically significant, with a total probability of .001. This means that the large difference in the salaries could occur in the absence of some sex bias or systematic bias with respect to the sexes only one time in one thousand. The statistics further showed that, if the range of salaries for accountants were 0 to 1000, the average female accountant at Grade 12 would be making $283.00 and the average male accountant at the same grade $463.00. The chances of such a large discrepancy in salary ranges could occur without bias between the sexes was also determined to be only 1 out of 1000. The expert concluded his testimony by pointing out that the number of people used to make his statistical analysis was sufficient to form a valid statistical conclusion and to assure that the calculations were reliable. All of the data that the expert used was complied from documents produced by the Respondent and from information provided by the Respondent to assist the Petitioner in examining and interpreting the documents reviewed.

The opinions of both Courts below were based upon their findings that the Respondent offered legitimate nondiscriminatory reasons for its failure to promote Petitioner and further that Petitioner's statistical data was defective and therefore entitled to no weight or consideration.

The District Court ruled in favor of the Respondent, and the Court of Appeals affirmed without oral argument. Appendix A1-A10 and A11-A20.

REASONS FOR GRANTING THE WRIT

1. Certiorari should be granted to resolve conflicts in principle among the Courts of Appeals and to decide an important question of federal law which should be settled by this Court.

Title VII of this Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., affords protection to members of certain groups against discrimination in employment based upon their membership in those particular groups. Section 2000e-2(a) states as follows:

It shall be an unlawful employment practice for an employer—

> (1) To fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or natural origin . . . .

The Courts recognize that employment decisions will usually and legitimately be cased upon a determination by the employer as to the best qualified applicant, and where a member of a protected class is the best qualified applicant, then that person is entitled to favorable action by the employer. *Cooper v. Allen*, 493 F.2d 765 (5th Cir. 1974).

One real danger that the Civil Rights Act is intended to prevent is the excessive use of purely subjective criteria by the employer to make employment decisions and to determine qualifications. Although an employer has every right to establish qualifications of its employees for ad-

vancement, the employer may not utilize wholly subjective standards to judge its employees, qualifications and then defend an attack upon its promotional process by pleading a lack of qualifications. *Crawford v. Western Electric Company, Inc.*, 614 F.2d 1300 (5th Cir. 1980).

Although the *Crawford* case was based upon discrimination due to race rather than sex, its theory is applicable to this case. In *Crawford*, promotions depended upon the applicants' performing work in the higher levels and in being "qualified" for the higher levels. The qualifications, however, were based upon the supervisors' evaluation of the workers, and the evidence showed that the supervisors had no written instructions for the ratings, no way for the employer to determine whether the supervisors were using standardized criteria, no reasons that had to be given for an unfavorable rating, no permanent written records of the quality of work done by each worker, and assignment of the workers based partially on what the supervisors perceived to be the skills of the employee. The Court of Appeals of the Fifth Circuit had no problem in finding such a format to be discriminatory, and Petitioner alleges that the same result should follow in this case.

Further evidence in the record in this case indicates that the Respondent did not post notices of job openings above a certain grade level in its employment structure. The Petitioner learned of several promotions and job transfers only after the Respondent posted a notice congratulating or announcing the new job of the person promoted or transferred. Furthermore Petitioner indicated that neither her supervisors nor any other employee of the Respondent advised Petitioner of job openings for which she was denied promotion and for which she filed a charge of discrimination. Moreover, the Respondent

did not establish any form of procedure for an employee to apply for a promotion or advancement, and the supervisors at various levels of employment with the Respondent had the discretion either to advise or not to advise the persons under them that certain promotion opportunities or jobs were available.

Such a persistent failure and refusal to announce job openings above a certain level, coupled with the discretionary power of the supervisors to refer requests for promotion to the proper persons, are detrimental factors to promotion opportunities. *Senter v. General Motors*, 532 F.2d 511 (6th Cir. 1976); *Rowe v. General Motors*, 457 F.2d 348 (5th Cir. 1976). See also *Myers v. Gilman Paper Corporation*, 392 F.Supp. 413 (S.D. Ga. 1975), *affirmed in part and reversed in part on other grounds*, 544 F.2d 837, *cert. denied*, 434 U.S. 801. The effect of this discretion is evident from the record showing that several of the Petitioner's supervisors indicated they would or did refuse to mention her name for promotion, or that they would express opposition to her promotion had her name ever been submitted.

In *Robinson v. Union Carbide Corp.*, 538 F.2d 652 (5th Cir. 1976), *modified on other grounds*, 544 F.2d 1258, *cert. denied*, 434 U.S. 522, the employees alleged discrimination based upon race in the area of promotions. The employer based promotion decisions upon questionnaires and evaluations from supervisors, but those questionnaires sought the supervisor's opinions regarding the candidates' "adaptability, hearing, demeanor, manner, verbal expression, appearance, maturity, drive, and social behavior," *Id.* at 662. The Court of Appeals found such subjective criteria used in promotion decisions to be an obvious violation of Title VII. In this case the Respondent alleged that its refusal to promote Petitioner was due solely to her

personal and social relationship with others, clearly the type of subjective evaluation that the court rejected in *Robinson*.

Also of interest is *Baxter v. Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033. In *Baxter* the court noted that the supervisors who recommended employees for promotion had no objective job descriptions to aid or guide them. In addition, the lack of notice of job openings available and the qualifications desired for promotion made black employees totally dependent upon their white superiors for promotion. The Fifth Circuit found such a situation to be patently illegal under Title VII. Inasmuch as the same general situation existed here for Petitioner, the lower courts should have made the same finding that the system the Respondent here used was patently in violation of Title VII.

The District Court apparently agreed with the Respondent's allegations that the Petitioner lacked a basic qualification—the ability to communicate effectively with others. The evidence does not show any factual basis for such a finding, however, and in fact the various job assignments that Petitioner had required entensive contact and communication with her home office and with numerous outlying field offices. Her successful performance of that job itself repudiates Respondent's contentions. Furthermore those qualifications are of a highly subjective nature and thus subject to abuse as discussed above. The evidence also showed that Respondent assigned Petitioner to a job position that had no description, thus indicating an attempt by Respondent to shunt petitioner aside and prepare its case against her.

Petitioner also alleged that Respondent engaged in retaliatory conduct after Petitioner filed her charge of

discrimination. Neither court below found in her favor on her claim in contravention of favorable rulings from courts in other circuits and in the face of sworn testimony by a superior of Petitioner that the Respondent was "leaving [Petitioner] where she was and building a case against her." The Eighth Circuit has ruled that an employer violates the Civil Rights Act, 42 U.S.C. § 2000e-3, if retaliation plays *any* part in adverse action; petitioner need not show that retaliation was the sole reason for adverse action. *Slotkin v. Human Development Corporation of Metropolitan St. Louis*, 454 F.Supp. 250 (E.D. Mo. 1978). Furthermore, the timing of certain adverse action against the Petitioner including the failure to award a pay increase, an attempted layoff, and an annual review by someone well above her immediate supervisor clearly supports her charge of retaliation. The failure of the lower courts in this case to agree directly conflicted with cases from other circuits. *Sherkow v. Wisconsin Department of Public Instruction*, 24 E.P.D. ¶31194 (7th Cir. 1980), *EEOC v. Pacific Press Publishing Association*, 21 E.P.D. ¶30522 (N.D. Cal. 1979). The lower courts here also ignored the clear intent of Respondent to build a poor record against Petitioner, contrary to the holding in *Mead v. United States Fidelity and Guaranty Company*, 442 F.Supp. 114 (D. Minn. 1977), *petition for writ of mandamus denied*, 585 F.2d 820 (8th Cir. 1978), *cert denied*, 440 U.S. 913.

Finally Petitioner also contends that the lower courts ruled in conflict with other circuits regarding the statistical evidence adduced by Petitioner. The District Court ruled that the number of persons involved constituted too small a statistical base for the evidence to be probative, and the Court of Appeals supported that decision with practically no comment. These rulings totally ignored and discredited the unopposed testimony of Petitioner's statistical expert regarding the validity of the results despite

the size of the universe used. The Courts also were contrary to the notion expressed in *Davis v. Califano*, 21 E.P.D. ¶30363 (D.C. Cir. 1979) where the Court of Appeals found that statistics could themselves establish a prima facie case, even with respect to an individual claim. The courts below were also in conflict with the Fifth Circuit, which found statistics to be valid when based upon a field of only five employees in *Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895 (5th Cir. 1978). The theory in the *Payne* case was that the impact of an employment practice is not on the number of positions to be filled but rather on the number of persons excluded.

In conclusion the rulings of the lower courts in this case are clearly in direct conflict with rulings in similar situations from various other circuits. The continued importance of the discrimination laws and the increased impact of computers and their statistical powers make this question an important one that merits consideration by this court.

2. The Tenth Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court.

In their decisions in favor of Respondent and against Petitioner, the lower courts in this case have ruled contrary to decisions of this Court in similar matters, in particular *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), *International Brotherhood of Teamsters v. United States*, 421 U.S. 324 (1977), and *Furnco Construction Corporation v. Waters*, 438 U.S. 567 (1978). This Court should consider this case consequently in order to rectify the conflict between the lower courts and this Court.

The Court of Appeals properly concluded that *Burdine, supra,* allows an employer to exercise discretion when choosing among applicants who meet any objective qualifications. It improperly concluded, however, that Respondent has not used subjective analysis in its exclusion of Petitioner from promotions she sought. The record below clearly establishes that Respondent continued to apply purely subjective considerations in its refusal to promote petitioner. Thus Respondent was in violation of Title VII, and petitioner should have reclined judgment in her favor.

With respect to petitioner's claim of illegal retaliation, she contends that the lower courts failed to heed the direction set out in *Burdine* and in *Furnco, supra.* These cases and others have established that the Respondent must produce evidence that would dispel the inference of retaliation by establishing the existence of a legitimate reason for the employment action taken. The courts below erred in their focus only on the discharge of Petitioner without giving any attention to the continuing problems faced by petitioner from the initial filing of her EEOC complaint until her ultimate termination. Petitioner clearly established that the discharge was a pretext for discrimination, but the courts below ruled against her despite the clear mandates of *Furnco* and *Burdine.*

Finally the failure of the courts below to accord any weight at all to petitioner's statistical evidence is contrary to this Court's directive from *International Brotherhood of Teamsters v. United States,* 421 U.S. 324 (1977). In footnote 20 of that case, at page 339, this Court emphasized the importance of statistical evidence. Even a small universe can provide invaluable statistical evidence where the statistics show a great disparity in treatment and where there is other strong evidence in this case clearly estab-

lished an enormous dispartiy in treatment and reflected that the situation as found could result only once in one thousand times without discrimination. The refusal of the lower courts to consider such a disparity obviously violates the prior decisions of this Court and requires this Court's further attention.

CONCLUSION

The explicit conflict among the various circuits as to the various issues raised by the Petitioner as well as the conflict of the Tenth Circuit Court of Appeals decision with prior decisions of this Court provide ample justification for the granting of this petition for a writ of certiorari. I therefore suggest that certiorari should be granted in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEAL
TENTH CIRCUIT

No. 80-1741

JEWEL BURRUS,
Plaintiff-Appellant,

v.

UNITED TELEPHONE COMPANY OF KANSAS, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 76-231-C2)

(Filed July 22, 1982)

Submitted on the briefs:

Richard H. Anton, Kansas City, Missouri, for Plaintiff-Appellant.

J. Richard Smith, Overland Park, Kansas; and Arlyn D. Haxton and John A. Verling, III, of Dietrich, Davis, Dicus, Rowlands & Schmitt, Kansas City, Missouri, for Defendant-Appellee.

Before SETH, Chief Judge, LOGAN, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a); Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

Jewel Burrus brought this sex discrimination action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, against United Telephone Company of Kansas, Inc. (UTC). Burrus alleges that UTC engaged in unlawful employment discrimination by failing to promote her because of her sex,[1] and by retaliating against her after she filed charges of discrimination.[2] We affirm the trial court's holding that UTC did not violate Title VII.

---

1. The relevant statute, 42 U.S.C. § 2000e-2(a), provides in pertinent part:

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."

2. The relevant statute, 42 U.S.C. § 2000e-3, provides in pertinent part:

> "(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

I.

Background of Case

The facts relevant to Burrus' Title VII action are as follows. Burrus is an a[illegible]ntant. She worked for the American Telephone & Telegraph Company (AT&T) between 1948 and 1968. From June 1968 until February 1970, she was employed by United Systems Services, Incorporated (USS). Thereafter, Burrus worked for defendant UTC until she was terminated in 1976. Both USS and UTC are wholly owned subsidiaries of United Telecommunications, Incorporated.

While employed by these companies, Burrus held various positions and pursued her education. During her last five years of employment with AT&T, she served as an Accounting supervisor. Neither she nor anyone she supervised at AT&T had an accounting degree. Burrus' job title throughout her employment with defendant UTC was "accountant," although she did not obtain her Bachelor of Science accounting degree until 1972.

UTC never promoted Burrus. UTC did, however, promote some of her male and female contemporaries to supervisory positions. Burrus claims that she was as well qualified as the promoted males; that she had made known her desire for promotion; and that UTC not only refused to promote her, but closed out available positions by appointing males to them.

Because of the alleged discriminatory practices of UTC, Burrus filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC) and the Kansas Commission on Civil Rights. Her retaliation claim is based on an allegation that after she filed her charge, UTC further restricted her growth opportunities and generally conspired to drive her from the firm.

Both the EEOC and the Kansas Commission found no probable cause to believe Burrus' charges were true. Burrus subsequently filed this lawsuit in federal court. After a bench trial, the court held against Burrus on all her claims. Burrus argues on appeal that the district court erred: (1) by holding she was not discriminated against because of her sex; (2) by finding UTC did not unlawfully retaliate against her after she filed discrimination charges; and (3) by finding Burrus' statistical study to be without probative value.

II.

Sex Discrimination

In holding that Burrus was not the victim of unlawful sex discrimination, the trial court found:

> "The evidence in this case indicates that plaintiff may have been technically as well qualified as some of her male counterparts who were promoted. It also shows that she was certainly not as technically qualified as two of the males about whom she has complained. More importantly, the evidence suggests that plaintiff was indeed ill-qualified for promotion to a supervisory position, in that she lacked the interpersonal skills necessary for such an advancement. Plaintiff remained unpromoted because she was uncommunicative and unable to work effectively with others."

Rec., Vol. I, at 27. The court concluded that "[s]ince . . . plaintiff was not qualified for promotion by reason of her general lack of interpersonal skills, it follows . . . that the court must find as a matter of law that plaintiff has not made out a *prima facie* claim of discrimination in this case." *Id.* at 29.

Burrus argues that the district court erred in its findings that Burrus was not qualified for promotion and thus did not make out a prima facie case of promotion discrimination. She also argues that the criteria used for promotion were too subjective.

A Title VII disparate treatment action for promotion discrimination proceeds in three stages. The plaintiff first has the burden of establishing a prima facie case of employment discrimination under the standards set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). If the prima facie case is established, the defendant must articulate a reason, using admissible evidence, to explain why "the plaintiff was rejected, or someone else preferred, for a legitimate, nondiscriminatory reason." *Texas Department of Community Affairs*, 450 U.S. at 254. If such a reason is offered, in order to prevail the plaintiff must demonstrate that the defendant's articulated reason is a mere pretext for unlawful discrimination. *Id.* at 256. Throughout these stages, the overall burden of persuasion remains with the plaintiff. *Id.*

In this case, the trial court concluded that Burrus had failed to establish a prima facie case because she was not "qualified for promotion by reason of her general lack of interpersonal skills," rec., vol. I, at 29, even though she "may have been technically as well qualified as some of her male counterparts who were promoted." *Id.* at 27.

The Ninth Circuit has recently considered at what stage subjective qualifications are properly addressed in the *McDonnell Douglas* three-step analysis. In *Lynn v. Regents of the University of California*, 656 F.2d 1337, 1344 (9th Cir. 1981), the court concluded:

> "[O]*bjective job qualifications are best treated at step one* and *subjective criteria*, along with any supporting evidence, *are best treated at the later stages of the process*. To do otherwise would in many instances collapse the three step analysis into a single initial step at which all issues would be resolved. This would defeat the purpose underlying the McDonnell Douglas process. See Sweeny, 439 U.S. at 24 n.1, 99 S. Ct. at 296 n.1."

Id. (emphasis added). We agree with this analysis. Although subjective evaluations play a legitimate part in an employer's determination whether an employee has the ability to supervise others, *Bauer v. Bailar*, 647 F.2d 1037, 1046 (10th Cir. 1981), it is also apparent that "subjective decision making provides an opportunity for unlawful discrimination." *Id.*; *Thornton v. Coffey*, 618 F.2d 686, 691 (10th Cir. 1980); *Abrams v. Johnson*, 534 F.2d 1226, 1231 (6th Cir. 1976). In fact, the rejection of an otherwise qualified individual on the basis of subjective considerations entitles the plaintiff "to the benefit of an inference of discrimination, which inference requires the defendants to come forward and articulate legitimate reasons for her non-selection." *Bauer*, 647 F.2d at 1045; *see Texas Department of Community Affairs*, 450 U.S. at 253.

If a plaintiff's failure to establish that she met the employer's subjective criteria could defeat her prima facie case, the court would then not be required to consider evidence of pretext. Thus the use of subjective criteria could go unchallenged. This result is clearly at odds with the mandate of *McDonnell Douglas* that a plaintiff be afforded a full and fair opportunity to demonstrate that the stated reason for rejection was in fact pretext. 411 U.S. at 804; *see also Texas Department of Community Affairs*, 450 U.S. at 255-56. Although the trial court in this

case found that Burrus was objecti ely qualified for the position, it improperly concluded on the basis of subjective criteria that Burrus failed to establish a prima facie case.

The trial court went on to hold, however, that even assuming the existence of a prima facie case based on Burrus' objective qualifications, the subjective evaluation that she lacked the required ability to get along with others was a legitimate business reason amply supported by the evidence and not rebutted by any showing of pretext. We must uphold these findings of fact unless they are clearly erroneous. *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123 (1969); *Williams v. Colorado Springs, Colo. School District #11*, 641 F.2d 835, 843 (1981). Trial court findings are not clearly erroneous unless we are definitely and firmly convinced, after reviewing the record as a whole, that a mistake has been made. *id.*

Where applicants for a position have objective qualifications that are equal, it is within the employer's discretion to choose among them so long as the decision is not based on unlawful criteria. *Texas Department of Community Affairs*, 450 U.S. at 259. We have reviewed the entire record in this case and we do not have a definite and firm conviction that the trial court was mistaken in finding no discrimination. There is evidence that two of the promoted males were more qualified than Burrus because of education, experience, or both. The other males were at least as well qualified as Burrus. Several employees of UTC, including Burrus' direct supervisor and a female employee, testified that Burrus did not get along or communicate well with other UTC employees. Adequate evidence supports the trial court's ultimate conclusion that Burrus was not discriminated against on the basis of her sex.

III.

Retaliation

Burrus contends the district court erred in finding that UTC did not retaliate against her because she filed charges of sex discrimination. Burrus claims that pay and promotional opportunities were denied her, and that she ultimately was terminated in retaliation for her charges.

The general approach to Title VII suits set out in *McDonnell Douglas* and *Texas Department of Community Affairs* is also applicable to retaliation claims. *Grant v. Bethlehem Steel Corp.*, 622 F.2d 43, 46 (2d Cir. 1980); *Womack v. Munson*, 619 F.2d 1292. 1296 (8th Cir. 1980), *cert. denied*, 450 U.S. 979 (1981); *Mitchell v. Visser*, 529 F. Supp. 1034, 1044 (D. Kan. 1981). A plaintiff must first establish a prima facie case of retaliation by showing that: (1) she engaged in protected opposition to Title VII discrimination or participated in a Title VII proceeding; (2) she was disadvantaged by an action of her employer subsequent to or contemporaneously with such opposition or participation; and (3) there is a causal connection between the protected activity and the adverse employment action. *Smalley v. City of Eatonville*, 640 F.2d 765, 769 (5th Cir. 1981); *Gunther v. County of Washington*, 623 F.2d 1303, 1314 (9th Cir. 1979) *aff'd on other grounds*, 452 U.S. 161 (1981); *Grant*, 622 F.2d at 46; *Womack*, 619 F.2d at 1296. The causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. *See Grant*, 622 F.2d at 46; *Womack*, 619 F.2d at 1296 & n.6.

If a prima facie case is established, then the burden of production shifts to the defendant to articulate a legiti-

mate, nondiscriminatory reason for the adverse action. *Womack*, 619 F.2d at 1296. The defendant need not prove the "absence of retaliatory motive, but only produce evidence that would dispel the inference of retaliation by establishing the existence of a legitimate reason." *Id.*; *see Texas Department of Community Affairs*, 450 U.S. 254-55; *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577-78 (1978). If evidence of a legitimate reason is produced, the plaintiff may still prevail if she demonstrates the articulated reason was a mere pretext for discrimination. The overall burden of persuasion remains on the plaintiff. *Texas Department of Community Affairs*, 450 U.S. at 255-60.

Here, plaintiff was terminated in January 1976, almost three years after she filed her initial charge of gender discrimination. The record supports the conclusion that Burrus' whole department was justifiably terminated, male and female, because it was duplicating work done elsewhere. Given the length of time between the filing of charges and the termination, we agree with the trial court that Burrus failed to establish a prima facie case of retaliation based on her termination.

The record also amply supports the trial court conclusion that even if Burrus made out a prima facie case of retaliation based on unfavorable job evaluations and lack of pay increases prior to termination, UTC offered legitimate reasons for Burrus' restricted opportunities which she did not demonstrate were a mere pretext for discrimination. *See e.g., Gunther*, 623 F.2d at 1314; *Miller v. Williams*, 590 F.2d 317, 320 (9th Cir. 1979). Without detailing all the evidence, we note testimony regarding Burrus' continuing attitudinal problems and her inability to work with fellow employees. Thus, we must uphold the trial court's conclusion that UTC did not unlawfully retaliate against Burrus.

IV.

Statistical Study

Burrus also argues that the district court erred in holding that Burrus' statistical evidence was without probative value. However, adequate evidence in the record supports the trial court's conclusion that the data base of the study was defective because of its small size and other factual inaccuracies.

The judgment of the district court is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
CIVIL ACTION

NO. 76-231-C2

JEWEL D. BURRUS,
Plaintiff,

vs.

UNITED TELEPHONE COMPANY
OF KANSAS, INC.,
Defendant.

(Filed June 19, 1980)

JOURNAL ENTRY OF JUDGMENT

This action came on to be tried before the Court, and the evidence adduced by the parties and the arguments of counsel having been heard, and thereupon, upon consideration thereof, the Court having rendered and filed an Opinion and made and filed Findings of Fact and Conclusions of Law dated June 10, 1980, it is hereby

Ordered, Adjudged and Decreed that final judgment be entered herein in favor of the defendant and against plaintiff on the plaintiff's Complaint and that the same is hereby dismissed with costs to the defendant.

/s/ Dale E. Saffels
United States District Judge

Dated: Jun 19 1980

APPROVED AS TO FORM THIS 17 DAY OF JUNE, 1980.

/s/ John McKay
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
CIVIL ACTION

NO. 76-231-C2

JEWEL D. BURRUS,
Plaintiff,

vs.

UNITED TELEPHONE COMPANY
OF KANSAS, INC.,
Defendant.

(Filed June 10, 1980)

MEMORANDUM AND ORDER

Plaintiff filed this sex discrimination action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* The parties tried the case to the court between April 14 and April 17, 1980. The following are the court's findings of fact and conclusions of law with regard to that trial.

I. FINDINGS OF FACT

Plaintiff is a female accountant. Defendant employed her between February, 1970, and January, 1976. United Systems Services, Inc. employed plaintiff between June, 1968, and February, 1970. Defendant and United Systems Services, Inc. are wholly-owned subsidiaries of United Telecommunications, Inc., a holding company. During her tenure with defendant, plaintiff advanced from a Job Grade 9 to a Job Grade 12. Although she did not receive her accounting degree until 1972, plaintiff's job title with defendant throughout her employment was "accountant." Defendant did not promote plaintiff during the term of

her employment with defendant. Prior to her employment with United System Services, Inc., plaintiff worked for the American Telephone and Telegraph Company between 1948 and 1968. During the last five years of her time with A.T. & T., plaintiff served as an Accounting Supervisor. While with A.T. & T., however, plaintiff never had occasion to supervise anyone who possessed an accounting degree. As previously mentioned, plaintiff acquired her Bachelor of Science in Business Administration, with a major in Accounting, in 1972. While still in the employ of defendant, plaintiff took certain coursework toward a Master of Arts degree.

Plaintiff's cause of action is premised upon the allegations that defendant failed to promote plaintiff, and took certain retaliatory actions against plaintiff, due to the fact that defendant actively pursued a policy of sex discrimination in employment. Plaintiff was specifically disgruntled by the fact that certain of her male contemporaries were promoted to supervisory positions within the defendant company. Plaintiff complains that she was as well qualified as the males in question, that she had made known her desire for promotion, and that defendant not only refused to promote plaintiff, but also closed out the available positions by appointing males to them. But the evidence indicates, and the court so finds, that in all cases detailed by plaintiff, the males about whom plaintiff complains were at least as well qualified as plaintiff for the supervisory positions in question. In fact, the court finds that at least two of the males involved, Gary Hamilton and Ronald Sondergard, were more qualified than plaintiff for accounting supervision positions, by reason of either experience or education or a combination of the two.

In consequence of the allegedly discriminatory decisions of defendant in promoting certain males to supervisory positions, plaintiff filed a charge of sex discrimination in March, 1973 with the Equal Employment Opportunity Commission and the Kansas Commission on Civil Rights. Plaintiff claims that as a result of having filed the charge in question, defendant retaliated against plaintiff by, among other things, further restricting her growth opportunities and generally conspiring to drive her out of the firm. Defendant's failure to promote plaintiff, as well as its alleged retaliation against her for the EEOC-KCCR claim, form the basis of this action.

The court finds as a matter of fact that the ability to get along and communicate with one's peers, subordinates and superiors is a crucial consideration in the determination of whether a person is suitable for promotion to a supervisory position in nearly any business setting, and specifically in the context of plaintiff's employment with defendant. The court also finds that there is no evidence, either documentary or testimonial, which would tend to establish that plaintiff possesses this critical quality. Indeed, with the exception of plaintiff's testimony, all of the evidence in this case indicates either directly or indirectly that plaintiff is uncommunicative and generally lacking in interpersonal skills. The corroborative testimony on this issue comes not only from current employees of defendant who worked with plaintiff, but also from plaintiff's former supervisor, who is no longer employed by defendant, and has instituted his own litigation against defendant.

The evidence in this case indicates that plaintiff may have been technically as well qualified as some of her male counterparts who were promoted. It also shows that she was certainly not as technically qualified as two of

the males about whom she has complained. More importantly, the evidence suggests that plaintiff was indeed ill-qualified for promotion to a supervisory position, in that she lacked the interpersonal skills necessary for such an advancement. Plaintiff remained unpromoted because she was uncommunicative and unable to work effectively with others.

II. CONCLUSIONS OF LAW

Title VII actions proceed in three stages. The plaintiff first has the burden of making a *prima facie* case that the defendant has engaged in some discriminatory practice. The defendant is next permitted to show that the alleged discriminatory practices were undertaken for legitimate, non-discriminatory reasons. Finally, the plaintiff may rebut defendant's evidence with a showing that the non-discriminatory reasons put forth by defendant for its actions are in fact nothing more than a pretext for discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); and *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978).

A plaintiff may make out a *prima facie* claim of discrimination by showing:

> "... (i) that he belongs to a ... minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. ..." *McDonnell Douglas Corp. v. Green, supra*, at 802.

In this case, plaintiff has established that she had made plain to defendant her desire to advance. She has

also shown that she was not promoted, while her male contemporaries were successful in achieving higher levels in management. The critical question, then, is whether plaintiff was qualified for the positions for which she applied.

The case law makes it abundantly clear that a plaintiff fails to make a *prima facie* showing of discrimination if plaintiff does not establish his or her qualification for the job in question. *Johnson v. Fulton Sylphon Division*, 439 F.Supp. 658 (E.D. Tenn. 1977) [poor work record]; *Thompson v. McDonnell Douglas Corp.*, 552 F.2d 220 (8th Cir. 1977) [frequent absences]; *Lim v. Citizens Savings and Loan Assn.*, 430 F.Supp. 802 (N.D. Cal. 1976) [education and experience]; *United States v. University of Maryland*, 438 F.Supp. 742 (D.Md. 1977) [lack of experience]; and *Winfrey v. Metropolitan Utilities District*, 467 F.Supp. 56 (D.Neb. 1979) [errors on job]. More importantly, it has been consistently held that an inability to get along with one's associates in a work environment will support an employer's decision either not to promote or to discharge an employee. A *prima facie* case of discrimination is not made out when such elements are present in a case. *Stevens v. Junior College District of St. Louis*, 548 F.2d 779 (8th Cir. 1977); *Cedeck v. Hamilton Federal Savings and Loan Assn.*, 414 F.Supp. 495 (E.D.Mo. 1976); *Bradington v. International Business Machines Corp.*, 360 F.Supp. 845 (D.Md. 1973); *Lindsey v. Southwestern Bell Telephone Co.*, 546 F.2d 1123 (5th Cir. 1977); *Morales v. Dain, Kalman & Quail, Inc.*, 467 F.Supp. 1031 (D. Minn. 1979); *Mopkins v. St. Louis Die Casting Corp.*, 423 F.Supp. 132 (E.D.Mo. 1976), *aff'd.* 569 F.2d 454 (8th Cir. 1978); and *Naraine v. Western Electric Co., Inc.*, 507 F.2d 590 (8th Cir. 1974). Since the court has already found as a matter of fact that plaintiff was not qualified for promotion by reason of her general lack of interpersonal

skills, it follows from the above that the court must find as a matter of law that plaintiff has not made out a *prima facie* claim of discrimination in this case.

Even if the court were to assume *arguendo* that plaintiff had established a *prima facie* claim of discrimination in this matter, the evidence adduced by defendant on the subject of plaintiff's personality would constitute sufficient grounds for negating the inference of discriminatory conduct raised by plaintiff. In this connection, it should be noted that an employer may "articulate" a legitimate, non-discriminatory reason for its conduct toward an employee without having to actually prove the absence of discriminatory motive; that is, the employer may meet his burden by merely explaining what was done, as long as the actions complained of were undertaken for non-discriminatory reasons. *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978); and *Diggs v. Western Electric Co.*, 587 F.2d 1070 (10th Cir. 1978). It has been held that a subjective analysis of the personality characteristics of an employee may represent a legitimate and non-discriminatory reason for the failure of an employer to hire or promote an individual. *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325 (5th Cir. 1978); *Haire v. Calloway*, 572 F.2d 632 (8th Cir. 1978); and *Williams v. Yazoo Valley-Minter City Oil Mill, Inc.*, 469 F.Supp. 37 (N.D.Miss. 1978).

Some mention needs to be made of certain statistical evidence introduced by plaintiff. Plaintiff's counsel assembled certain data regarding the employees, male and female, who composed the accounting department in which plaintiff worked while in defendant's employ. The data generally covered the time period during which plaintiff worked for defendant. Plaintiff's statistical evidence is based on fifty-five cases, each "case" representing a particular individual who worked contemporaneously with

plaintiff in defendant's accounting department. Plaintiff submitted this data to a statistical expert, who analyzed the information with the aid of a computer. The conclusion reached by plaintiff's statistical expert was that differences in salary and authority as between male and female employees in defendant's accounting department during the period in question could only be explained by the presence of sexual bias on the part of defendant.

The court finds as a matter of law that plaintiff's statistical evidence is without probative value. The statistical evidence produced here has several weaknesses. First, it is based on a study of only fifty-five persons. The very size of the group studied detracts from the ultimate value of the exercise. In addition, plaintiff made no attempt to compare the employee group in question to the other employee groups existing in defendant's organization. Neither did plaintiff relate her statistical evidence to comparable evidence relevant to the Kansas City Metropolitan area as a whole. It is generally recognized that statistical evidence based on a "small universe" has very little probative value. *EEOC v. North Hills Passavant Hospital*, 466 F.Supp. 783 (W.D.Pa. 1979); *Mopkins v. St. Louis Die Casting Corp., supra; Ochoa v. Monsanto Company*, 335 F.Supp. 53 (S.D.Tex. 1971), *aff'd* 473 F.2d 318 (5th Cir. 1973); and *Friend v. Leidinger*, 446 F.Supp. 361 (E.D.Va. 1977), *aff'd* 588 F.2d 61 (4th Cir. 1978). Moreover, plaintiff's statistical evidence contains certain inaccuracies, such as the multiple inclusion of some individuals (under different names) and the inclusion of certain persons who were not members of the group in question. Where questions exist as to the accuracy of the elements which make up a statistical example, the probative value of the evidence is undermined. *United States v. University of Maryland, supra;* and *Williams v.*

New Orleans Steamship Assn., 466 F.Supp. 662 (E.D.La. 1979). Finally, since this is an action by an individual grievant, even if plaintiff's statistical evidence were found to have probative value, it would tell the court very little regarding defendant's reasons for not having promoted plaintiff. *Terrell v. Feldstein Co., Inc.*, 468 F.2d 910 (5th Cir. 1972); *Johnson v. Fulton Sylphon Division, supra;* and *Wilson v. Woodward Iron Co.*, 362 F.Supp. 886 (N.D. Ala. 1973).

In conclusion, the Court finds as a matter of law that:

(a) Plaintiff has not proven any facts to support her claim that defendant discriminated against her by refusing to promote her because of her sex, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.*

(b) Plaintiff has not proven any facts to support her claim that defendant has discriminated against her because of her sex by harrassing her in her employment, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.*

(c) Plaintiff has not proven any facts to support her claim that defendant retaliated against her because she filed charges of sexual discrimination against defendant, or because she had otherwise protested unlawful employment practices by defendant, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.*

(d) Assuming without deciding that plaintiff had made a *prima facie* case of sex discrimination or retaliation against defendant, defendant articulated sufficient legitimate non-discriminatory reasons for its actions, thereby shifting the burden to plaintiff to show that the proffered justification was a pretext for discrimination. Plaintiff

failed to establish that the justification was a pretext for discrimination or that "but for" her sex or her having filed a charge of discrimination, she would have been more favorably treated by defendant.

Defendant is entitled to judgment in its favor against plaintiff on plaintiff's complaint, and plaintiff is not entitled to relief against defendant on the claims alleged in her complaint.

Defense counsel is directed to prepare an appropriate Journal Entry of Judgment. Said Journal Entry of Judgment is to be circulated to opposing counsel and presented to the court for signature.

IT IS SO ORDERED.

DATED: This 10th day of June, 1980, at Kansas City, Kansas.

/s/ Dale E. Saffels
Dale E. Saffels
United States District Judge

Office - Supreme Court, U.S.
FILED
NOV 15 1982
ALEXANDER L. STEVAS
CLERK

No. 82-700

In the Supreme Court of the United States

October Term, 1982

JEWEL BURRUS,
Petitioner,

vs.

UNITED TELEPHONE COMPANY
OF KANSAS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent, United Telephone Company of Kansas, Inc., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Tenth Circut's opinion in this case. That opinion is reported at 683 F.2d 339.

STATEMENT OF THE CASE

Respondent does not feel that a full restatement of the case is necessary, however, that portion of petitioner's statement on pages 6 and 7 of her petition pertaining to the subject of her statistical evidence departs from a fair recital of relevant facts and is comprised chiefly of argumentative statements, allegations of legal conclusions attributed to her expert witness regarding the probative value of his testimony and substantial editorializing of the record in this matter. The petitioner fails in her statement to mention that the record in this matter contains evidence of a number of inaccuracies in the data base upon which her expert witness grounded his conclusions including incomplete data for each of the years of employment regarding the 55 employees who were the subject of the statistical sample, inclusion of female clerical employees in lower pay grades than petitioner and consideration of a number of employees twice because of confusion of their married and maiden names. Based upon the evidence of such inaccuracies in the data base, together with evidence that the samples were smaller than the universe from which conclusions were attempted to be drawn, the trial court found that the statistical evidence of petitioner lacked probative value. The court of appeals held such finding to be supported by the record.

Respondent feels constrained also to comment upon what it perceives to be an implication in petitioner's recitations of her statement that, whatever inaccuracies there may have been in her statistical data base were due to information provided to petitioner by respondent in the course of discovery. While, of course, it is true that respondent provided certain business records to petitioner from which petitioner compiled certain statistics, the in-

accuracies arose during the compilation from such records—not from the information and records themselves. The record in this matter is bereft of any indication whatsoever that respondent supplied inaccurate records or information to petitioner or even that petitioner claimed as much during the trial.

REASONS FOR DENYING THE WRIT

1. Certiorari should be denied because there is no conflict in principle among the courts of appeal and no important questions of federal law which should be settled by this court.

No conflict in the decisions or in principle exists among the courts of appeal on the proper use of subjective criteria in employment decisions.

The cases that Petitioner relies upon in support of her contention that the Court of Appeals for the Tenth Circuit erroneously held that subjective criteria may be used to explain why she was rejected for promotions actually either support the decision in the lower court or are readily distinguishable from the instant case. For instance, in *Baxter v. Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033, the court found, as did the court below, that the denial of a promotion to an otherwise qualified individual for subjective reasons was a prima facie violation of Title VII requiring the employer to articulate a "legitimate, nondiscriminatory reason" for not promoting the plaintiff. *Id.* at 442. *Both* the court below and the court in *Baxter* found that subjective criteria are permissible "legitimate, non-discriminatory reasons." *Id.* at 446.

In *Baxter*, the court held that an individual discriminatee could not recover for the company's failure to promote him because there was evidence that he had a "bad attitude" and lacked the proper mechanical background. *Id.* at 446, note 3. Similarly, here the lower court held that Ms. Burrus could not recover against respondent because the trial court properly found that "[s]he lacked the required ability to get along with others [which] was a legitimate business reason amply supported by the evidence and not rebutted by any showing of pretext." 683 F.2d at 342. (Pet. p. A7).

These two decisions present no conflict with *Crawford v. Western Electric Co.*, 614 F.2d 1300 (5th Cir. 1980), where the court remanded the case to the trial court (after finding a prima facie case had been established) in order for it to make findings on testimony by supervisors regarding each "plaintiff's work habits, aptitudes, and *attitudes* that, if credible, might serve to rebut plaintiffs' cases by proving legitimate, non-discriminatory reasons for their slow advancement." *Id.* at 1320. (Emphasis supplied).

The court below upheld the trial court's finding of fact that the subjective evaluation that Burrus lacked the required ability to get along with others was a legitimate business reason for not promoting her. 683 F.2d at 342. (Pet. p. A7). Thus, the courts in *Crawford*, *Baxter* and below each have recognized that subjective evaluations such as poor attitude and inability to communicate with others can be "legitimate, non-discriminatory business reasons" for refusing to promote an employee.

Further, in the other case that petitioner cites in support of her argument that the circuits are in conflict, the court was not even presented with the question of whether any particular employee was not promoted because he was not qualified. In *Robinson v. Union Carbide*

Corp., 538 F.2d 652 (5th Cir. 1976), *modified on other grounds*, 544 F.2d 1258, *cert. denied*, 434 U.S. 522 (1978), the court was faced with the issue of whether certain promotional practices were discriminatory in the context of a class action. Thus, the court did not reach the second step of the "three-step" Title VII sequence of proof as established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and utilized by the court below in determining that petitioner's prima facie case was overcome by respondent's legitimate, non-discriminatory reason for failing to promote her.

Petitioner's argument that the lower courts' failure to find that she was discharged in retaliation for the filing of a claim with the Kansas Civil Rights Commission and the EEOC is in "conflict with cases from other circuits" is wholly devoid of merit and rests upon the novel theory that courts in different circuits are required to come to the same conclusion upon different fact situations and the testimony of different witnesses.

For example, in *Sherkow v. Wisconsin Department of Public Instruction*, 630 F.2d 498 (7th Cir. 1980), a case that the petitioner argues is in conflict with the court below, there was a trial court finding of unlawful retaliation. In the instant case, there was no such finding by the district court. Also, in *Sherkow*, there was testimony by the chairman of the interview panel that he had "negative reactions to her public statements on the subject of discrimination and that this affected his assessment of her qualifications for the job." *Id.* at 502.

Similarly, in *EEOC v. Pacific Press Publishing Association*, 482 F.Supp. 1291 (N.D. Cal. 1979) the court found that the termination in question was retaliatory and that "Press has failed to come forward with a legiti-

mate, non-discriminatory explanation for its conduct." *Id.* at 1316. Here, both lower courts found that respondent had come forward with a legitimate, non-discriminatory explanation for its conduct. *See also Mead v. United States Fidelity and Guaranty Company*, 442 F.Supp. 114 (D. Minn. 1977) (evidence did not sustain assertion that plaintiff did not get along with her fellow employees).

Petitioner further complains that the "lower courts ruled in conflict with other circuits" by ruling that the number of persons involved constituted too small a data base for certain statistical evidence to be probative. However, the size of the statistical base was just one of several factors upon which the trial court based the finding that the statistics lacked probative value. These factors included "inclusion of certain persons who were not members," "multiple inclusion of some individuals (under different names)" and failure to make comparison between the "employee group in question to the other employee groups existing in defendant's organization." (Pet. p. A18).

Even if the size of the statistical base had been the sole factor relied upon by the courts below, petitioner fails to show any conflict among the circuits on the issue. The case of *Davis v. Califano*, 613 F.2d 957 (D.C. Cir. 1979) cited by petitioner, is totally inapposite here. In *Davis*, the court found that statistical evidence may establish a prima facie case of employment discrimination in an individual case as well as in a class action case. That court did not hold that *all* statistical evidence, no matter how inaccurate or flawed, established a prima facie

In *Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895 (5th Cir. 1978), the court actually held that the fact that there were only five positions open did not preclude a finding that an employment condition resulted in a statis-

tically disparate impact because the "proper focus when determining the disparate impact of an employment condition is on those excluded by the requirement, not on the number of positions to be filled. . . ." *Id.* at 899.

As *Payne* was a "disparate impact" case and this case is not and because *Payne* did not hold that a statistical sample of five was sufficiently probative, it has no bearing upon the facts in the instant case.

Because the lower courts in the case at bar found serious factual errors in the survey which affected its accuracy, the isolated issue of whether a 55 person sampling is probative or not does not present itself.

2. The Tenth Circuit Court of Appeals has followed the applicable decisions of this Court in deciding the issues in this case.

Petitioner complains that the Tenth Circuit Court of Appeals has decided this case in conflict with this Court's decisions in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) and *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978). Petitioner's argument rests on an erroneous interpretation of the lower court's holding.

First, petitioner contends that the court of appeals "improperly concluded, however, that Respondent has not used subjective analysis in its exclusion of Petitioner from promotions she sought." (Pet. p. 14).

The lower court made no such conclusion. Actually, the court of appeals upheld, 683 F.2d at 342 (Pet. p. A7), the trial court's finding that:

> "[E]ven assuming the existence of a prima facie case based on Burrus' objective qualifications, the sub-

> jective evaluation that she lacked the required ability to get along with others was a legitimate business reason amply supported by the evidence and not rebutted by any showing of pretext."

Next, petitioner contends that "Respondent must produce evidence that would dispel the inference of retaliation for the employment action taken." (Pet. p. 14).

Assuming *arguendo* that petitioner is correct on this legal point, in this case there was *no* prima facie showing made to raise an inference of retaliation. Also the court upheld the finding that, even *assuming* a prima facie case had been made:

> "UTC offered legitimate reasons for Burrus' restricted opportunities which she didn't demonstrate were a mere pretext for discrimination . . . . Without detailing all the evidence, we note testimony regarding Burrus' continuing attitudinal problems and her inability to work with fellow employees." *Id.* at 343-4. (Pet. p. A9).

The above remarks of the court clearly indicate that it did *not* focus solely on the discharge of petitioner as she contends but, rather, considered matters continuing throughout her employment.

Finally, petitioner's reliance upon this Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) is greatly misplaced. Although correct in her assertion that the Court pointed out the importance of statistical evidence, she is incorrect in her conclusion that the decision stands for the proposition that erroneous and flawed evidence deserves to be accorded probative value by any court. In fact, the Court cautioned in that decision, at 340, that the usefulness of statistics "depends on all of the surrounding facts and circum-

stances" and that "Considerations such as small sample size may, of course, detract from the value of such evidence." *Id.* at 340, n.20.

CONCLUSION

Respondent respectfully submits that petitioner has failed to demonstrate any grounds for granting a writ of certiorari in this matter. She has not shown a real conflict among the circuits on the same matter of law or fact. The alleged conflict with the decisions of this Court does not exist. Rather, it is clear that she seeks review of a decision of the Tenth Circuit which turns solely upon the analysis of the particular facts involved. She asks this Court to review the evidence and the concurrent findings of fact by the two lower courts in absence of any showing of error. The court of appeals below has correctly assessed the record and has found that the findings of fact by the trial court are supported by substantial evidence. There is no need for additional review by this Court.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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